

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CURLIN PENNICK, III,

Plaintiff,

vs.

FRANK LEONETTI, JOHN DOE
HEARING OFFICER, MATT
JOHNSON, AL KUNZ, CHUCK
PEASE, FRED WARNEKA, JON
GRADWOHL, CRAIG SPENCER, JOE
DENNY, and JOHN DOE
SUNDBERG,

Defendants.

NO. CV-06-5075-FVS

ORDER DENYING MOTION FOR
INJUNCTIVE RELIEF AND ORDER TO
COMPLY WITH ORDER TO AMEND OR
VOLUNTARILY DISMISS COMPLAINT

BEFORE THE COURT are Plaintiff's First Amended Complaint (Ct. Rec. 13) and Motion for Temporary Restraining Order and Preliminary Injunction (Ct. Rec. 16). Plaintiff, a prisoner at the Washington State Penitentiary, is proceeding *pro se* and *in forma pauperis*. Defendants have not been served. Attorney Sara J. Olson, however, has appeared on behalf of Defendants for the limited purpose of responding to Plaintiff's Motion. See Ct. Recs. 22 and 23.

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quotations and citations omitted). The purpose

1 of a preliminary injunction is to preserve the status quo if the
2 balance of equities so heavily favors the moving party that justice
3 requires the court to intervene to secure the positions until the
4 merits of the action are ultimately determined. *University of Texas v.*
5 *Camenisch*, 451 U.S. 390, 395 (1981). A preliminary injunction is
6 available to a plaintiff who "demonstrates either (1) a combination of
7 probable success and the possibility of irreparable harm, or (2) that
8 serious questions are raised and the balance of hardship tips in its
9 favor." *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937
10 (9th Cir. 1987). Under either approach the plaintiff "must
11 demonstrate a significant threat of irreparable injury." *Id.* Also, an
12 injunction should not issue if the plaintiff "shows no chance of
13 success on the merits." *Id.* At a bare minimum, the plaintiff "must
14 demonstrate a fair chance of success of the merits, or questions
15 serious enough to require litigation." *Id.*

16 A federal court is a court of limited jurisdiction. As a
17 threshold matter the court must have a "case" or "controversy" before
18 it for consideration. *Flast v. Cohen*, 392 U.S. 83, 88 (1968). If the
19 court does not have a "case" or "controversy" before it, it has no
20 power to hear the matter in question. *Rivera v. Freeman*, 469 F.2d
21 1159, 1162-63 (9th Cir. 1972). At this juncture, Plaintiff has not
22 stated any cognizable claims for relief in this action.

23 The court has reviewed the First Amended Complaint and finds it
24 fails to cure the deficiencies of the initial complaint. Therefore,
25 the court lacks jurisdiction to issue any injunctive relief.
26 Accordingly, **IT IS ORDERED** Plaintiff's Motion for Temporary
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1 Restraining Order/Preliminary Injunction (Ct. Rec. 16) is **DENIED**.
2 Plaintiff shall comply with the court's previous Order directing him
3 to amend or voluntarily dismiss this action.

4 **NAMED DEFENDANTS**

5 Plaintiff was advised he must name all Defendants in the caption
6 of his complaint (an amended complaint supersedes the initial
7 complaint). Although named as Defendants in the caption of his First
8 Amended Complaint, and in the body of the amended complaint, Plaintiff
9 provides no identifying information in paragraphs 3 through 13
10 regarding Defendants Victor Sword, John Doe Baker, Jordan or Sheldon.
11 Furthermore, Plaintiff alleges no facts from which the court could
12 infer Defendants Sword or Baker violated Plaintiff's constitutionally
13 protected rights. He appears to allege at paragraph 52 that these
14 Defendants infringed Plaintiff for refusing to obey an order on an
15 unspecified date. Such allegations do not rise to the level of a
16 constitutional violation. Furthermore, Plaintiff's vague and
17 conclusory allegations against Defendants Jordan, Flores, Guzman,
18 Sinclair and Sheldon, at paragraph 53 also fail to demonstrate a
19 constitutional violation.

20 **FALSE INFRACTIONS**

21 Plaintiff appears to allege Defendants Kunz, Johnson, Pease,
22 Gradwohl, Spencer and Denny falsely infringed Plaintiff for failing to
23 cooperate with an investigation regarding gang activity. Obstructing
24 an investigation is not a constitutionally protected right. Plaintiff
25 fails to state how the actions of these Defendants failed to advance
26 the legitimate penological interests of maintaining order and
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1 discipline. As presented, Plaintiff's allegations do not rise to the
2 level of a constitutional violation.

3 In addition, an inmate has no constitutionally guaranteed
4 protection from being wrongly accused of conduct; rather, he has a
5 constitutional right not to be deprived of a protected liberty
6 interest without due process. See *Freeman v. Rideout*, 808 F.2d 949,
7 951 (2d Cir.1986), cert. denied, 485 U.S. 982 (1988). According to
8 the United States Supreme Court's decision in *Sandin v. Conner*, 515
9 U.S. 472 (1995), a district court must focus on the nature of the
10 deprivation imposed when determining whether an inmate is entitled to
11 procedural due process protections. *Id.* at 483-87 (a prisoner has no
12 federal or state protected liberty interest in due process when the
13 sanction imposed neither extends the length of his sentence nor is
14 "atypical and significant" in relation to the ordinary incidents of
15 prison life).

16 As stated in *Meachum v. Fano*, 427 U.S. 215 (1976), the Due
17 Process Clause does not protect every change in the conditions of
18 confinement, not even ones having a "substantial adverse impact" on
19 the prisoners. *Meachum*, at 224. Based on the analysis in *Sandin v.*
20 *Conner*, time spent in segregation is insufficient to invoke procedural
21 due process protections. Indeed, the Ninth Circuit explicitly has
22 found that administrative segregation falls within the terms of
23 confinement ordinarily contemplated by a sentence. *Toussaint v.*
24 *McCarthy*, 801 F.2d 1080, 1091-92 (9th Cir. 1986). Accordingly,
25 Plaintiff's allegations regarding segregation are insufficient to
26 state a claim upon which relief may be granted under *Sandin*.

1 While the Eighth Amendment requires prison officials to provide
2 prisoners with the basic human needs, including reasonable safety, it
3 does not require that the prisoners be comfortable and provided with
4 every amenity. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982).
5 A prisoner has no constitutionally protected right to be housed in the
6 institution of his choice. *Olim v. Wakinekona*, 461 U.S. 238, 245-49
7 (1983). Furthermore,

8 When prison officials have legitimate administrative authority,
9 such as the discretion to move inmates from prison to prison or
10 from cell to cell, the Due Process Clause imposes few
11 restrictions on the use of that authority, regardless of any
12 additional motives which are claimed to exist. It doesn't matter
13 what label is placed on the action or what other reasons may be
14 behind it; nor is it relevant that the conditions of confinement
15 may become less pleasant as a result. We must allow prison
16 officials the freedom to exercise their administrative authority
17 without judicial oversight. Some administrative actions will
18 inevitably make prisoners feel cheated; nevertheless, this does
19 not give them a federal cause of action.

20 *Grayson v. Rison*, 945 F.2d 1064, 1067 (9th Cir. 1991) (footnote
21 omitted).

22 MEDICAL TREATMENT

23 For an inmate to state a claim under § 1983 for medical
24 mistreatment or denial of medical care, the prisoner must allege "acts
25 or omissions sufficiently harmful to evidence deliberate indifference
26 to serious medical needs." *Hudson v. McMillian*, 503 U.S. 1, 9
27 (1992); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "Because society
28 does not expect that prisoners will have unqualified access to health
care, deliberate indifference to medical needs amounts to an 8th
Amendment violation only if those needs are 'serious.'" *Hudson*, 503
U.S. at 9 (citing *Estelle*, 429 U.S. at 103-104).

A serious medical need exists if the failure to treat a

1 prisoner's condition could result in further significant
2 injury or the unnecessary and wanton infliction of pain . .
3 . . The existence of an injury that a reasonable doctor or
4 patient would find important and worthy of comment or
5 treatment; the presence of a medical condition that
significantly affects an individual's daily activities; or
the existence of chronic and substantial pain are examples
of indications that a prisoner has a serious need for
medical treatment.

6 *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled
7 on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th
8 Cir. 1997).

9 To demonstrate deliberate indifference, a prisoner must allege
10 facts sufficient to indicate a culpable state of mind on the part of
11 prison officials. *Wilson v. Seiter*, 501 U.S. 297 (1991). Deliberate
12 indifference exists when an official knows of and disregards a serious
13 medical condition and the official is "aware of facts from which the
14 inference could be drawn that a substantial risk of harm exists, and
15 he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837
16 (1994).

17 Differences in judgment between an inmate and prison medical
18 personnel regarding appropriate medical diagnosis and treatment,
19 however, are not enough to establish a deliberate indifference claim.
20 See *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Mere
21 indifference, medical malpractice, or negligence also will not support
22 a cause of action under the Eighth Amendment. *Broughton v. Cutter*
23 *Lab*, 622 F.2d 458, 460 (9th Cir. 1980). A mere delay in treatment
24 does not constitute a violation of the Eighth Amendment, unless the
25 delay causes harm. *Wood v. Housewright*, 900 F.2d 1332, 1335 (9th Cir.
26 1990). Here, Plaintiff alleges no facts from which the court could
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1 infer Defendants Sundberg, Leonetti or Ponti were actual medical care
2 providers who disregarded Plaintiff's known serious medical condition,
3 causing actual harm. Plaintiff fails to provide the dates he sought
4 and was denied medical treatment for his dust mite allergies.

5 If Plaintiff wishes to amend his complaint again to present
6 cognizable claims, he is free to do so. He is cautioned, however, if
7 the court finds the Second Amended Complaint is frivolous, malicious,
8 or fails to state a claim, the Second Amended Complaint will be
9 dismissed pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2). Such a
10 dismissal would count as one of the dismissals under 28 U.S.C. §
11 1915(g).

12 **IT IS SO ORDERED.** The District Court Executive is directed to
13 enter this Order and forward a copy to Plaintiff, along with a form
14 Motion to Voluntarily Dismiss Complaint **and a civil rights complaint**
15 **form.** The District Court Executive shall send a courtesy copy of this
16 Order to Attorney Sara J. Olson.

17 **DATED** this 4th day of January 2007.

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19 s/ Fred Van Sickle
20 FRED VAN SICKLE
21 UNITED STATES DISTRICT JUDGE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CURLIN PENNICK, III,

Plaintiff,

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MOTION TO VOLUNTARILY DISMISS
COMPLAINT

Plaintiff CURLIN PENNICK, III, requests the court grant his Motion to Voluntarily Dismiss the Complaint pursuant to Rule 41(a), Federal Rules of Civil Procedure. Plaintiff is proceeding *pro se*; Defendants have not been served in this action.

DATED this _____ day of _____ 2007.

CURLIN PENNICK, III,